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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1931.

No. 790

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of RESPONDENTS.

For their brief in this case on the writ of *certiorari* respondents adopt and incorporate herein all of the argument and matter set forth in their brief previously filed in this cause in opposition to the petition for writ of *certiorari*, and furnish the following as a supplement or addition to their prior brief.

Statement of the Case.

The statement of the case, given by petitioner at pages 2-7 of his brief on *certiorari*, is substantially correct. Pe-

titioner does not, however, give any of the particulars regarding the *four* suits filed prior to this one, which four suits were based on the same cause of action as the first cause of action in the instant case and which had been removed to the federal courts and there dismissed by the plaintiff. Therefore, specific attention is respectfully directed to the statement of facts contained at pages 4-7 of the brief of respondents in opposition to the petition for writ of *certiorari* in this case, and the following supplementary statement of facts, which shows the chronological order of events in this respect.

Chronological Statement.

On August 1, 1927, Mrs. A. L. Smith (Lillian Smith) was regularly appointed as administratrix of the estate of Archie Lee Smith, deceased, by the County Court of Pawnee County, Oklahoma, and letters of administration were duly issued to her pursuant thereto.

On October 27, 1927, an action was commenced by said administratrix in the District Court of Oklahoma County, Oklahoma, against the respondents and certain individual defendants employed by one or other of respondents, based upon the same cause of action as the first cause of action in the instant case, seeking to recover $100,000.00 as damages (R. 13; also 42). After regular procedure, on November 28, 1927, this first case was ordered removed to the United States District Court for the Western District of Oklahoma. Subsequently, motion to remand to the state court was filed by said administratrix, which motion to remand was over-

ruled on June 6, 1928 (R. 14, also 42). Thereafter, on July 6, 1928, said administratrix filed a dismissal of said cause (R. 15, also 43).

On or about July 8, 1928, a second action was commenced by the same plaintiff against respondents and certain employees of one or other of respondents, upon the same cause of action, in the District Court of Oklahoma County, Oklahoma, being case number 56098, asking a recovery of the same amount as the first case. *(Id.)*

On July 9, 1928, a third action was commenced by the same plaintiff against respondents and certain employees of one or other of respondents, on the same cause of action, asking a recovery of the same amount, having been brought in the District Court of Tulsa County, Oklahoma, as case number 43033 (R. 16, also 42).

Pursuant to due procedure, an order of removal was granted in the second action, being case number 56098 in the District Court of Oklahoma County, Oklahoma, and this case also was removed to the United States District Court for the Western District of Oklahoma (R. 15, also 42).

After regular procedure, on August 9, 1928, an order of removal was granted in the third action, being case number 43033 in the District Court of Tulsa County, Oklahoma, and this case was removed to the United States Court for the Northern District of Oklahoma (R. 16-17, also 42).

A motion to remand was filed in the second action which had been case number 56098 when it was in the District Court of Oklahoma County, Oklahoma; but the United

States Court for the Western District of Oklahoma, overruled such motion on November 15, 1928, and thereafter, on December 6, 1928, the administratrix as plaintiff therein dismissed said case (R. 15-16, also 42).

On December 10, 1928, Mrs. A. L. Smith resigned as administratrix of the estate of Archie Lee Smith, deceased, and filed in the administration proceedings upon the estate of said Archie Lee Smith, deceased, in the County Court of Pawnee County, Oklahoma, her request for the appointment of William H. Mecom, the petitioner here, as administrator of said estate. Said William H. Mecom was a resident of Louisiana, of which state defendant Fitzsimmons Drilling Company was a resident; and the *motive* behind his appointment was a destruction of the diverse citizenship theretofore existing between the parties to this controversy (R. 43). On the same day, on which Mrs. Smith resigned, a petition for the appointment of petitioner as administrator of said estate was filed and signed "William H. Mecom by Roy F. Ford," said Roy F. Ford being attorney for Mrs. A. L. Smith in the three suits brought by her as above related, and on said day an order was made by the County Court of Pawnee County, Oklahoma, appointing petitioner as such administrator (R. 17-18; also 42-44; also 53-64). The petition for letters of administration recited that petitioner here, William H. Mecom, was a friend of the family of A. L. Smith, deceased, which was not the fact. *(Id.)*

In the third action brought by the administratrix as plaintiff, which had been number 43033 when in the District Court of Tulsa County, Oklahoma, a motion to remand had

been filed after the case had been removed to the national court, and on December 13, 1928, such motion was overruled by the United States Court for the Northern District of Oklahoma, and a dismissal of said cause was filed by said plaintiff on the same day (R. 16-17, also 42).

In December, 1928, probably about December 26th, the petitioner Mecom received some papers from the law firm of Ford & Montgomery of which the said Roy F. Ford was one of the members, which petitioner signed and returned, he having consented to act as administrator of the estate of A. L. Smith, deceased, as an accommodation to such law firm. These papers consisted of an oath of administrator, power of attorney in favor of Mrs. A. L. Smith (according to the judgment of petitioner as set forth in his deposition) and apparently of an appointment of Mrs. A. L. Smith as the resident agent of petitioner in Oklahoma. This appointment of resident agent, which was dated December 26, 1928, and oath of administrator, were filed in the County Court of Pawnee County, Oklahoma, on January 3, 1929. Prior thereto, on December 12, 1928, the bond of petitioner as administrator of the estate of said A. L. Smith, had been filed and approved, the name of petitioner being signed thereto by Roy F. Ford as his attorney (R. 43). After a motion to remand this action had been filed, respondents filed a response thereto and a hearing was had on the special issue of fraud and collusion raised thereby (R. 26-30, also 32-33). Respondents, prior to the hearing on said issue, took petitioner's deposition and he testified that he was not related to or acquainted with either A. L. Smith, deceased, nor any

of his next of kin or heirs; that after executing the papers above mentioned, on or about December 26, 1928, he had nothing further to do with the estate of A. L. Smith, deceased, and received absolutely no information about such estate, and that he had no knowledge of any claim or litigation in which the estate of A. L. Smith was interested; and also that he at no time gave any direction with reference to the commencement of any action in his name (R. 43-44; also opinion of Circuit Court of Appeals, R. 53).

On January 5, 1929, an action against respondents was commenced in the name of petitioner as plaintiff, in the District Court of Oklahoma County, Oklahoma, on the same cause of action as the first cause of action in the case which is now before this court, seeking to recover the sum of $100,000.00 and being case number 57527 (R. 20, also 42).

On January 26, 1929, *a fifth action* against respondents was commenced in the name of petitioner as plaintiff, in the District Court of Oklahoma County, Oklahoma. This action, with its subsequent developments, is the one now before this court. Originally, it was an action for $3,000.00, and was based on the same cause of action that is now the second cause of action herein and sought a recovery for pain and suffering of decedent after his injury and before his death. This case was number 57713 in the state District Court (R. 21, also 42).

In case number 57527 in the District Court of Oklahoma County, Oklahoma, the fourth action, after proper proceedings were had, an order of removal was made on February 4, 1929, and the case was removed to the District

Court of the United States for the Western District of Oklahoma. After the removal of this case, a motion to remand was filed, and the same was overruled by the court on May 8, 1929, and the plaintiff was required by the court to make a cost deposit or cost bond. The plaintiff by his attorneys, having refused in open court to make such a cost deposit or cost bond, such case was ordered dismissed by the court. (R. 20-21, also 42).

Thereafter, on May 15, 1929, an amended petition in case number 57713 in the District Court of Oklahoma County, Oklahoma, was filed, same containing the two causes of action which are stated by petitioner in his brief. After the filing of this amended petition, which sought a total recovery of $103,000.00, the cause was removed to the United States District Court for the Western District of Oklahoma, and further proceedings were had as related by petitioner in his brief, and as related by respondents in their brief in opposition to the petition for writ of *certiorari* (R. 21-47).

With respect to the four cases filed and dismissed by counsel representing Mrs. Smith, it should be noted that in each instance an unsuccessful attempt was made to prevent removal by fraudulently joining resident defendants. (See petition for removal, pages 13-17, and stipulation at page 42, with respect to said actions, and order overruling motion to remand at page 32.) We mention this for the purpose of showing how determined counsel were to defeat federal jurisdiction. It should further be noted that, on petitioner's motion to remand this action, a special issue of fraud and collusion was framed and that the trial court found such issue in favor of these respondents (R. 26-30, also 32-33).

Before going into the argument of the case, it is deemed perhaps advisable to point out one thing: Petitioner observes at page 4 of his brief in the statement of facts, that "some four other lawsuits had been filed by the widow as administratrix, seeking to recover on the first cause of action set out in petitioner's amended petition, which actions had all been removed to the federal court and dismissed by plaintiff therein prior to the institution of the present suit, *but it was agreed that none of the four cases had contained a cause of action the same or similar to the second cause of action set out in petitioner's petition.*" This second cause of action was for damages in the sum of $3,000.00, and if it had been the only cause of action the case would not have been removable on account of the amount involved. The statement quoted above is not precisely correct, since only three actions had been filed by the widow as administratrix seeking to recover on the first cause of action set out in petitioner's amended petition, the fourth action previous to this one seeking a recovery on the same cause of action having been brought in the name of petitioner as administrator. It might be fairly presumed that petitioner does not seek to show that joining a non-removable cause of action with a removable one, has the effect of making the case non-removable, inasmuch as he does not refer to the matter in his argument and does not cite any authorities in connection with the matter. But since petitioner has mentioned the situation, respondents submit that the combination of the second cause of action with the first cause of action is ineffective to prevent removal. *McLaughlin* v. *Western Union Telegraph Co.*, 7 Fed. (2d) 177.

The Circuit Court of Appeals, in its opinion herein, said on the phase of the litigation:

"Coming now to the second cause of action removed and pleaded in the petition, it may be said that cause of action could neither have been brought in the federal court nor, standing alone, have been removed thereto for want of jurisdiction over the subject-matter in a federal court, for the jurisdictional amount in controversy was not claimed, and any recovery had would go into the estate for administration and distribution by the administratrix. However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts or causes of action, one of which controversies is removable into a federal court and the other not removable, a removal into a federal court of the cause of action which may be removed brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf. *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 112; *Barney* v. *Latham*, 103 U. S. 205, 26 L. ed. 514; *Brooks* v. *Clark*, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482; *Connell* v. *Smiley*, 156 U. S. 335, 15 S. Ct. 353, 39 L. ed. 443; *Venner* v. *Southern Pac. Co.*, (C. C. A.) 279 F. 832; *Rogers* v. *Penobscot Mining Co.*, (C. C. A.) 154 F. 606; *Cella, Adler & Tilles* v. *Brown*, (C. C.) 136 F. 439; *Hamilton* v. *Empire Gas & Fuel Co., et al., and Shriver* v. *Empire Gas & Fuel Co.*, (C. C. A.) 297 F. 422; *Hoffman* v. *Lynch*, (D. C.) 23 F. (2d) 518; *Bedell* v. *Baltimore & O. R. Co.*, (D. C.) 245 F. 788; *Strother* v. *Union Pac. R. Co.*, (D. C.) 220 F. 731; *Flas* v. *Illinois Central R. Co.*, (D. C.) 229 F. 319, and many other cases."

See opinion as reported in 47 Fed. (2d) 28.

ARGUMENT.

On the strength of the undisputed facts in this case, as above outlined, respondents submit the following propositions:

First. Even in the absence of collusion, in an action brought under sections 824 and 825, Compiled Oklahoma Statutes of 1921, as amended, Session Laws 1925, the citizenship of the beneficiaries under such statutes and not that of the personal representative of the deceased, governs in determining the jurisdiction of the United States courts on the ground of diversity of citizenship.

Second. As the facts in this case are sufficient to show that identity of citizenship of adverse parties has been brought about by acts of collusion or artifice or conspiracy for the express purpose of defeating the jurisdiction of United States court in a case otherwise cognizable in such court, such acts will not be permitted to deprive the federal court of jurisdiction, or to in any way affect the jurisdiction of such court.

First Proposition.

Even in the absence of collusion, in an action brought under sections 824 and 825, Compiled Oklahoma Statutes of 1921, as amended, the citizenship of the beneficiaries under such statutes and not that of the personal representative of the deceased, governs in determining the jurisdiction of the United States courts on the ground of diversity of citizenship.

While it is ordinarily true that in an action brought by

an administrator, an executor, a guardian or a trustee, or other representative or fiduciary, it is the citizenship of such representative or fiduciary that will be considered in determining whether or not, for the purpose of federal jurisdiction, diverse citizenship exists, this rule is not universally true. When an administrator, trustee or other person brings an action and is what this court has termed a "mere conduit" for the transference to the beneficiaries of the monies sought to be recovered, then the citizenship of such beneficiaries governs. In none of the cases in this court relied upon and cited by petitioner was the plaintiff, as here, a "mere conduit" for the transference of funds and hence we do not consider them in point and for that reason do not discuss them in detail.

The wrongful death statutes of Oklahoma (sections 824 and 825, C. O. S. 1921, as amended by chapter 125, Session Laws 1925) provide that the damages recovered thereunder "must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin to be distributed in the same manner as personal property." If no administrator is appointed, the suit must be maintained by the surviving spouse, if any, or by the next of kin, if no spouse survives. If an administrator is appointed, the action for the alleged wrongful death must be brought in his name but if damages for the death are awarded and collected they, unlike the damages for pain and suffering, if there has been any, do not become assets of the decedent's estate but must be paid over by him, forthwith, to the beneficiaries designated by the statute. See *Aetna Casualty and Surety Company* v. *Young*, 107 Okl. 151, 231; *St. Louis and*

S. F. R. Co. v. *Goode*, 42 Okl. 784, 142 Pac. 1185, discussed at page 22 of respondents' brief herein in opposition to the petition for a writ of *certiorari*. See, also, the Circuit Court of Appeals opinion herein and *Smith* v. *Chicago, R. I. & P. Ry. Co.*, 42 Okl. 577, 142 Pac. 398. By inadvertence, the opinion of the Circuit Court of Appeals, both as it appears in the record and as reported in 47 Fed. (2nd) 28, cites the *Goode* case as holding that the damages recovered under the Oklahoma wrongful death statute "become assets of the decedent's estate." It is evident that by clerical error the word "not" has been erroneously omitted since the *Goode* case holds that such damages do *not* become assets of the decedent's estate.

Under these circumstances, the citizenship of the beneficiaries governs and the administrator, if there is one and suit is brought in his name, is a nominal party and this is true even though the suit must be brought in the name of the administrator, if one is appointed, and even though the administrator, when he brings the action, is "master of the litigation."

The opinion for the Circuit Court of Appeals in the case of *Atlanta, K. and N. Ry. Co.* v. *Hooper*, 92 Fed. 820, was written by Judge TAFT. There was involved in that case an action for wrongful death brought by administrator under the statutes of Tennessee. Such statutes provided that the action should be brought for the benefit of the widow or next of kin. Construing these statutes, it was said:

"The next of kin for whose benefit the suit is brought are the real plaintiffs, and the administrator

though dominus litis, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party, and a mere trustee. (Italics ours.)

The Tennessee wrongful death statutes construed in the *Hooper* case more nearly approach the Oklahoma statutes on the same subject than do those of Indiana passed upon in the case of *Cincinnati, H. & D. R. Co.* v. *Thiebaud*, 114 Fed. 918 (C. C. A., 6th Circuit), so strongly relied upon by petitioner and which, in our judgment, conflicts with the decision of this court in *Stewart* v. *Baltimore and O. R. Co.*, discussed *infra*.

When, however, the statute, as in Indiana, prescribes that the suit can be brought only by the administrator or where, as in Maryland, it provides that it can only be brought in the name of the state, nevertheless such plaintiff is merely nominal. In the case of *Stewart* v. *Baltimore and O. R. Co.*, 168 U. S. 445, an administrator sued in the District of Columbia for a wrongful death, occurring in Maryland. Under the District of Columbia wrongful death statute, the action had to be brought in the name of an administrator. Under the Maryland wrongful death statute, it had to be brought in the name of the State of Maryland. In either case, however, it was brought for the benefit of the persons pointed out by the particular statute. Under these circumstances, this court said:

> "The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in the district the personal representatives of the deceased. But neither the state in the one

case nor the personal representative in the other has any pecuniary interest in the recovery. *Each is simply a nominal plaintiff.* While in the district the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

"For purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 9 U. S. 5 Cranch 303 (3:108); *McNutt* v. *Bland*, 43 U. S. 2 How. 9 (11:159); *State of Maryland, For Use of Markley*, v. *Baldwin*, 112 U. S. 490 (28:822)." (Italics ours.)

In *McNutt* v. *Bland*, 2 How. 9, there was under consideration a statute of Mississippi, requiring an action on the sheriff's bond to be brought in the name of the governor of the state. It was held that the citizenship of the party injured governed and not the citizenship of the nominal plaintiff, who was characterized as "a mere conduit through whom the law affords a remedy to the person injured by the act or omissions of the sheriff." See, also, *Browne* v. *Strode*, 5 Cranch 303, and *Huf* v. *Hutchinson*, 14 How. 586, to the same effect.

In *Maryland* v. *Baldwin*, 112 U. S. 490, there was involved a statute of Maryland, requiring suit on an administrator's bond to be brought in the name of the state. It was held that the state was a nominal party and that the

citizenship of the persons interested in the estate, and for whose benefit the bond was given, governed.

In *Carter* v. *St. Louis and San Francisco*, 29 Fed. (2d) 628, the United States District Court for the Northern District of Oklahoma held that in an action for wrongful death, under the Oklahoma statute, the citizenship of the beneficiaries governed.

On the strength of the foregoing authorities, we submit that in an action brought for damages under the Oklahoma wrongful death statute, the citizenship of the beneficiaries and not that of the administrator governs, in determining federal jurisdiction on the ground of diversity of citizenship.

Proposition Two.

As the facts in this case are sufficient to show that identity of citizenship of adverse parties has been brought about by acts of collusion or artifice or conspiracy for the express purpose of defeating the jurisdiction of United States court in a case otherwise cognizable in such court, such acts will not be permitted to deprive the federal court of jurisdiction, or to in any way affect the jurisdiction of such court.

We think that the fundamental error of counsel for petitioner is in assuming that because each of the several acts performed by them in an endeavor to circumvent federal jurisdiction was authorized by statute, the combination of them for the express purpose of defeating a removal to the federal court cannot be the ground for holding that such acts amount to a fraudulent device that will not be allowed

to prevent a lawful removal of this cause. This court, of course, has held that where one is allowed, under the law of the particular state, to join a resident employee in an action for damages against a foreign corporation, and where there is a real intention to obtain a joint judgment, the fact that the joinder is made to prevent a removal to the federal court will be deemed immaterial. *Chicago, R. I. and P. R. Co.* v. *Schwyhart*, 227 U. S. 184; *Chicago, B. and O. R. Co.* v. *Willard*, 220 U. S. 413.

But here we have considerably more than the bare exercise of a legal right. We have what amounts to a conspiracy to defeat federal jurisdiction. In none of the cases in this court, where the motive behind a joinder was held immaterial, was the case first rightfully removed to the federal court, as here, and the cause then dismissed and a new action brought with a new defendant imported in order to prevent removal. Regardless of that, however, it is well recognized that lawful acts may be the links of a conspiracy. *Aikins* v. *Wisconsin*, 195 U. S. 194, 206; *Western Union Telegraph Co.* v. *International Brotherhood*, 2 Fed. (2d) 293.

We have such a situation here. Counsel had the legal right to dismiss the prior actions, which had been rightfully removed to the federal court. Mrs. Smith had the legal right to resign as administratrix of the estate of her deceased husband. She and counsel had the legal right to suggest to the County Court of Pawnee County, Oklahoma, that the petitioner, William H. Mecom, a resident of Louisiana, of which state one of the respondent corporations was a citizen, be appointed as administrator of said estate in

succession to Mrs. Smith. But counsel, Mrs. Smith and Mr. Mecom had no right to do and combine these acts for the express purpose of hindering the respondents *from exercising their right* to have this cause determined in the national courts. *If the federal courts are powerless to render unsuccessful a conspiracy to defeat their jurisdiction, they are impotent indeed.*

It is not true, as counsel contend, that the motive of the actor or actors is immaterial, if the act itself be one which the law permits. A bad or sinister motive can frequently make wrong an otherwise lawful act.

In *Aikins* v. *Wisconsin*, 195 U. S. 194, 206, it was said:

> "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 253, this court observed:

> "The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others."

In *Western Union Telegraph Company* v. *International Brotherhood*, 2 Fed. (2d) 993 [affirmed 6 Fed. (2d) 444], it

was held that while an individual had the right to cease work, a number of individuals had no right to combine to quit work for the purpose of obstructing interstate commerce. See, also, *Gompers* v. *Buck Stove and Range Company*, 221 U. S. 418, 439.

The subject is well discussed in the following excerpt from *Plant* v. *Woods*, 176 Mass. 492, 57 N. E. 1011, 1014:

> "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen* v. *Flood* as reported in (1898) App. Cas. 1, as follows: 'An act lawful in itself is not converted, by a bad or malicious motive, into an unlawful act, so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate. In so far as a right is lawful it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor—as, where one digs upon his own land for water (*Greenleaf* v. *Francis*, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra* v. *Bourges*, 141 Mass. 7, 4 N. E. 623); but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this

justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel, and of procuring a wife to leave her husband. *Tasker* v. *Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468, and cases therein cited. Indeed, the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See, on this, an instructive article in 8 Harv. Law Rev. 1, where the subject is considered at some length. It is manifest that not much progress is made by such general statements as those quoted above from *Allen* v. *Flood*, whatever may be their meaning."

Applying this reasoning, the right given by law to sue joint tort feasors jointly, might well be esteemed so absolute as to be enjoyed regardless of the motive behind the joinder. On the other hand, we deny that counsel, Mrs. Smith and Mr. Mecom, acting in concert and after federal jurisdiction had four times attached to this controversy, possessed the absolute right to plan and execute a series of acts, each in itself lawful under most circumstances, *for the express purpose of depriving respondents of the right of trying this controversy in the federal courts.*

Even if a statute, one of whose effects would be the depriving foreign corporations of the right to remove controversies to the federal courts, might not be upheld if adopted with that "sinister end" in view. *Railway Express Agency* v. *Virginia*, decided February 2, 1931. Surely, if a legislature is so restricted, individuals cannot claim that acts of

theirs performed to prevent federal jurisdiction are beyond scrutiny.

The Circuit Court of Appeals, in its opinion in this cause, discussed at some length the case of *Cerri* v. *Akron People's Telephone Company*, 219 Fed. 285, decided by Judge (afterwards Justice) CLARK. We think, as remarked by the Circuit Court of Appeals, that that case while "not like the present one in point of fact" is "by parity of reasoning * * * alike in principle with the instant case."

The federal courts have always zealously guarded against the collusive conferring of jurisdiction on the federal courts, and this was true even before the passage of the Act of March 3, 1875. *Lehigh Mining and Mfg. Co.* v. *Kelly*, 160 U. S. 327; *Miller* v. *East Side Canal Co.*, 211 U. S. 293; *Lake Company* v. *Dudley*, 173 U. S. 243; *City of Detroit* v. *Blanchfield*, 13 Fed. (2d) 13 (C. C. A.). *They should be equally zealous to protect defendants against being deprived by collusion, fraud or conspiracy of their right of removal to the federal courts.*

In fact, the whole matter is well summarized in the following quotation from *Wecker* v. *National Enamelling & Stamping Co.*, 204 U. S. 176, at page 186:

> "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

Collateral Attack.

It is seriously contended by counsel that the decision of the lower courts that the appointment of petitioner as administrator would not, under the circumstances of this case, be allowed to defeat federal jurisdiction, constitutes a collateral attack on the order of the County Court of Pawnee County, appointing the petitioner as Mrs. Smith's successor. This conclusion of counsel misconceives the position of respondents. They do not contend that petitioner's appointment is invalid, neither do they assert that for the purpose of administering decedent's estate such appointment is inoperative. Respondents' contention, in this connection, is simply that the collusive combination of counsel, Mrs. Smith and Mr. Mecom whereby, for the express purpose of defeating federal jurisdiction, a resident of Louisiana was substituted for a resident of Oklahoma as the personal representative of the decedent, should not and need not be sanctioned by the federal courts in determining whether or not they possess jurisdiction in this case.

Counsel's assertion that the responsibility for the situation created by petitioner's appointment rests entirely on the County Court of Pawnee County, and that, therefore, the national courts are powerless to redress the wrong that otherwise would be inflicted on respondents, is without merit. Except for Mrs. Smith's resignation and her nomination of petitioner as her successor and except for counsel conceiving and advising such steps for the purpose of defeating federal jurisdiction, such a situation could never have been created. We are not complaining of the County

Court of Pawnee County. We are complaining of collusion and conspiracy on the part of Mrs. Smith, counsel and petitioner.

Conclusion.

On the strength of the undisputed facts in this case and the foregoing principles and authorities, respondents believe that the decision herein of the Circuit Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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